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## *Copyrights*

### **China Hears Music, Issues Second Draft of Copyright Law**

**C**hina has released a second draft revision of its Copyright Law for public comment, dropping a clause that raised an outcry from Chinese musicians who said it violated their rights.

The controversial Article 46 would have allowed record producers to use another artist's music without obtaining consent as long as the work had been published for more than three months. It created a stir in China's music industry, with songwriters such as Gao Xiaosong calling the draft "a possible deprivation of music writers' copyright interests," according to reports in Chinese media.

The second draft of the law eliminates Article 46 and makes a number of changes in response to more than 1,600 comments submitted during a 30-day comment period on the first draft in April. The National Copyright Administration of the People's Republic of China (NCAC) released the second draft of the copyright law on its website July 6, and will accept comments by fax or letter until July 31.

"They had an enormous number of responses," said Tim Smith of Rouse, an intellectual property firm in Beijing. "It appears they have listened to some of those. I think they are taking account of public comment."

**Registration Dropped; Service Provider Liability Changed.** For example, the new draft eliminates a requirement that copyright holders need to register their copyrights to be eligible for certain statutory damages from a judge. Registering the copyright "meant a huge additional administrative burden" for the copyright holder, Smith said. "There was quite a bit of pushback on that."

In addition to removing Article 46, the second draft also makes some interesting changes around internet liability that could help musicians and recording artists, Smith said. For example, the second draft says that if a network service provider "instigates or helps others to infringe, it shall be jointly liable."

The first draft only held a network service provider to be jointly liable if it knew or should have known that others were using the network to infringe. "The key is that there is no knowledge element" in the new draft, Smith said. It simply says that "if the provider is actively involved, then they shall be jointly liable" for infringement.

In another case, the second draft makes it harder for a network service provider to argue that they had no ob-

ligation to monitor what third parties do on the network. "In the first draft, there was a statement which essentially says that you [as a network service provider] don't have a general obligation to monitor," Smith explained, adding that this is consistent with European laws.

The second draft does not eliminate this phrase, but introduces a caveat, saying that when a network service provider provides public access to others' work, performances, or sound recordings, the "no obligation to monitor" rule no longer applies. "They've clearly removed it as a defense," Smith says.

Such small changes could have a big impact, since many copyright infringement cases involve third parties using the internet to illegally distribute copyrighted works. "It's all about where you draw the line between the network service provider and the rights holder about where the infringement is actually happening," Smith said. Revisions in the second draft "move the line a little," possibly making it easier for copyright holders to prevail.

"Most of the changes in the second draft seem to address concerns raised by local communities," said He Jing, a senior consultant at ZY Partners, Beijing-based law firm specializing in Intellectual Property, in an email exchange with BNA on July 10. "The second draft amendment of the copyright law has some extensive changes," including adding three articles and significantly amending 22 of them.

**Copyright Management Changes.** In addition to dropping the controversial Article 46, there were some significant changes made to collective copyright management, He said. For those interested in secondary liability, the NCAC has amended the first draft in a way that the law now recognizes the liability to "induce" and "assist" infringement, He said. "The previous version was more on the safe harbor without saying affirmatively about the secondary liability."

While the NCAC seems to have omitted many concerns raised by the international community such as enforcement issues and technological protection measures, the NCAC still "still has ample opportunities" to address the issues in later drafts, He said. "No matter what is being said by NCAC in the current draft, it is just part of the process."

The NCAC is expected to issue another one or two drafts by October, and the final will be submitted to the State Council Legislative Affairs Office for further review, He said.

"The real legislature —State Council and National People's Congress—has the final say about the copyright law reform," He said. In the past, the State Council Legislative Affairs Office completely changed the

draft of the Patent Law prepared by the State Intellectual Property Office and the Trademark Law prepared by the State Administration of Industry and Commerce, He said.

“The NCAC draft is very important but it is not necessarily a reflection of a final version as we may expect to see in the end,” He said.

By LESLIE A. PAPPAS

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*The second draft of the Copyright Law, in Chinese, at <http://www.ncac.gov.cn/cms/html/309/3502/201207/759779.html>.*

*An accompanying explanation of the second draft, in Chinese, at: <http://www.ncac.gov.cn/cms/cms/upload/info/201207/759779/134155627509826706.doc>.*